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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re D.D., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

JULIA D.,

Defendant and Appellant.

G053768

(Super. Ct. No. DP025404)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis J. Keough, Judge. Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for
Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Joyce Riley,
Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Julia D. (Mother)¹ appeals from the juvenile court's order terminating parental rights to her son, D.D., pursuant to Welfare and Institutions Code section 366.26.² She contends the court erred in finding the beneficial relationship exception pursuant to section 366.26, subdivision (c)(1)(B)(i) did not apply. We affirm the judgment because substantial evidence supports the trial court's order.

FACTS

When D.D. was seven months old, he was removed from Mother's custody after she was arrested for child endangerment and being under the influence of a controlled substance. She was transported to Huntington Beach Jail. Police officers went to a gas station to investigate a possible drunk driver and saw D.D. in the center of the rear seat of mother's boyfriend's car. Mother's boyfriend appeared to be under the influence of a controlled substance, and Mother was passed out in the front seat of the car.

The Orange County Social Services Agency (SSA) filed a juvenile dependency petition alleging D.D. had suffered, or there was a substantial risk he would suffer, serious physical harm or illness, as a result of the failure or inability of his parents to supervise or protect him pursuant to section 300, subdivision (b). Additionally, the petition alleged Mother had an unresolved substance abuse problem, a history of domestic violence, and may have unresolved mental health issues. D.D. was placed with

¹ Several reports in the record show Mother was also known as Julia Z.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

his paternal grandparents. At the time the petition was filed, D.D.'s father, Nicholas D., (Father) was in custody.³

The detention report indicated the family had a prior child welfare history dating back to 2010, and both parents had extensive criminal backgrounds. The social worker reported there was also a history of domestic violence. In February 2014 Father scratched Mother's face and pulled at the steering wheel while Mother was driving with D.D. in the car. Mother asserted she was the victim of other acts of domestic violence in May 2014. The social worker had offered Mother voluntary family services from March to August 2013, but she refused to participate.

At the detention hearing, the court set a trial date for October 28, 2014. The court ordered Mother would have monitored visitation six hours a week; the same for Father upon his release from custody. On October 28, 2014, the parents submitted on the evidence and the court found the allegations of the petition as amended to be true. The court declared D.D. a dependent child and set a six-month review hearing for April 21, 2015.

Six-Month Review Hearing

According to social worker's report prepared for the six-month review hearing, D.D. remained in the care of his paternal grandparents and was said to be well adjusted and attached to them. Mother was placed on probation as a result of her convictions for child endangerment and being under the influence. She turned herself in on February 6, 2015, to serve a 90-day jail sentence.

Prior to her incarceration, Mother visited D.D. a total of nine times. The social worker noted that although Mother's visits were inconsistent, she was engaging and affectionate with D.D. during their time together. However, D.D. did not show any distress when the visits ended.

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Father is not a party to this appeal and will only be mentioned as necessary.

Subsequent to Mother's release from jail, the social worker attempted to contact her to arrange visitation by leaving two voicemails and visiting Mother's home. It was not until Mother's probation officer directed her to contact her social worker that Mother made contact.

On March 24, 2015, Mother discussed with her probation officer the desire to enter a residential drug treatment program, and they both agreed this would be beneficial for Mother. Although Mother failed to appear at the intake interview, a few days later she was given a second opportunity, and did appear for that interview. At the time of the six-month review hearing, Mother was on a waiting list for the Villa residential drug treatment program (the Villa).

At the six-month review hearing the court agreed with SSA's recommendation to continue reunification services and set a 12-month permanency review hearing.

12-Month Review Hearing

On October 21, 2015, the court held the 12-month review hearing. In a report prepared for this hearing, the social worker described Mother's progress on her case plan as moderate and recommended continuing services. Mother had completed a three-month inpatient substance abuse program at the Villa and had moved into Collette's Children Home (Collette's), which would allow her to reunify with D.D. She continued to visit D.D. and was in the process of moving toward unmonitored visitation. At the conclusion of the 12-month review hearing, the parties entered into a stipulation pursuant to which the court made findings and scheduled an 18-month review hearing for March 1, 2016.

18-Month Review Hearing

Several months before the hearing, on December 1, 2015, SSA filed an interim review report disclosing Mother had relapsed. She was terminated from both the

perinatal program and from Collette's. Mother missed some drug tests, and she declined an inpatient program referral.

In the next status review report, filed on February 18, 2016, the social worker noted Mother had only visited D.D. for 16.5 hours over the course of a four-month period. And in a report prepared for the 18-month review hearing, dated March 1, 2016, the social worker recommended the court terminate services and schedule a permanency hearing. She determined Mother's visitation with D.D. had been sporadic and she had not visited at all during the month of January. The social worker opined, "There is not a significant relationship between the child and the mother." At the 18-month review hearing, the court terminated services for both parents and scheduled a permanency hearing for June 29, 2016.

Before the Permanency Hearing

The paternal grandparents filed a request for de facto parent standing. The court granted the motion on May 3, 2016.

On April 19, 2016, SSA filed a section 388 petition seeking modification of Mother's visitation during her incarceration for a probation violation. Mother returned to jail on April 4, 2016, and her probation officer indicated she may be in custody until the middle of May 2016. The petition stated Mother had 19.5 hours of visitation during February and March 2016. The court denied the request for modification of visitation. The court granted Mother's request for six hours of monitored visitation while she was in local custody. Mother was released from custody on May 16, 2016.

In a report prepared for the permanency hearing, dated June 29, 2016, the social worker recommended parental rights be terminated. Since Mother had been released from custody in mid-May, she had visited D.D. for three hours on June 2, 2016, and did not show up for her next two visits. The social worker explained, "[n]either parent has demonstrated an on-going, long term pattern of being a parent who will no longer subject the child to the issues that brought him into dependency. [¶] The child's

needs continue to be met at a high level in his current home environment and the child is thriving in this placement. This is the home where the child was placed at eight-months of age, when the child was taken into custody, and is truly the only home that this child knows.”

On June 29, 2016, the permanency hearing was continued to July 13, 2016. On July 13, 2016, Mother filed a section 388 petition. As a changed circumstance, Mother asserted she entered a residential program on June 29, 2016. To support this claim, Mother submitted a letter from Wavelengths Recovery, verifying she entered the program and concluding Mother was making continued positive progress with her participation and involvement in her treatment. Mother’s petition sought D.D.’s return to her custody or, in the alternative, reinstatement of reunification services. The petition also alleged the following: Mother and D.D. “have a great relationship[.] [H]e loves being with [her] and [her] family. He is very comfortable around [Mother] and [they] have a child and mother bond. D.D. asks to come home and live with [Mother] and [Mother knows she is] capable of being the stable mother he needs.”

On July 13, 2016, before proceeding with the permanency planning hearing, the court considered Mother’s petition and asked her counsel to address the issue of the necessary prima facie showing. After considering argument, the court denied the 388 petition for failure to state a prima facie case.

Permanency Hearing

At the permanency hearing, the court considered Mother’s testimony. She stated her current visitation schedule with D.D. was Saturday and Sunday for three hours each day and she visited regularly. For the past eight months, the visits had taken place at New Alternatives. Before then, they visited at the caretakers’ home. Mother testified as follows: “We have a great time together. He is very comfortable with me. We cuddle [and] talk. We have a great mother and son relationship.” She said D.D. calls her “mommy,” his caretakers “grandma and grandpa,” and his father “daddy.”

Mother acknowledged she had missed some of her visits due to her drug addiction. Mother explained she refused to be around her son while she was under the influence. She claimed to be putting his best interests first in declining visitation. She had been sober for five months, during which time her visitation had been more consistent.

Mother recognized D.D. also had a positive relationship with his maternal grandmother, noting he ran right to her. She stated D.D. also always asked about his “big papa,” which was his nickname for his maternal grandfather. Mother believed D.D. loved his maternal grandmother because he grabbed her face and played with her hair. Maternal grandmother had been visiting with D.D. during Mother’s visits. Mother explained D.D. had not met her other son, Christian (who was in the custody of his father), but he knew he had a brother and asked about him.

Mother discussed the nature of her visits with D.D. For example, during their visit in early July, D.D. said he wanted to ride his bike to mommy’s house and to stay with mommy. Every time Mother saw D.D. he said he missed her. At the end of the visits, D.D. hugged her and said goodbye. Mother claimed D.D. told her he did not want to leave. Mother acknowledged she did not visit with D.D. as often as permitted, and she explained her schedule simply did not allow it. She tried to change the schedule, but did not receive responses from either the social worker or the caretakers.

The social worker reported D.D. had been in the same placement with his paternal grandparents since September 5, 2014, and they were prospective adoptive parents who were willing and able to provide and care for D.D. The minor was developmentally on target, attached and bonded to the prospective adoptive parents, responded well to their directions, and appeared happy in his placement. At the hearing, the parties did not dispute the issue of adoptability and the court found by clear and convincing evidence that it was likely the minor would be adopted.

The parties presented closing argument on the issue of whether the beneficial relationship exception to termination applied. Mother's counsel argued there was a strong bond between Mother and her son and Mother's counsel asked the court to order a bonding study. Counsel further argued Mother complied with visitation to the best of her ability. Minor's counsel objected to the bonding study, arguing D.D. had lived with the caretakers since he was eight months old and Mother's visitation had been very inconsistent. SSA also objected to the bonding study contending the request was untimely.

After argument concluded, the court commended Mother on her candor in acknowledging her substance abuse problem. The court noted Mother's struggle with drug abuse had "certainly colored her relationship with [her] child" during the dependency proceedings. The court stated its view had to be from the child's point of view and it denied the bonding study request. With respect to beneficial relationship exception to terminating parental rights, the court indicated it sympathized with Mother's difficulties and challenges, but found Mother had failed to meet her burden in establishing the exception applied. The court referenced two cases as supporting its ruling. First, the court in *In re Autumn H.* (1994) 27 Cal.App.4th 567 (*Autumn H.*), held interaction between natural parent and child will always confer some incidental benefit to the child, but the test is whether "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Ibid.*) Second, the juvenile court noted that in *In re Beatrice M.* (2002) 29 Cal.App.4th 1411 (*Beatrice M.*), the court held frequent, loving contact with the child is not sufficient to establish the benefit from a continuing relationship contemplated by the statute. The juvenile court terminated Mother's parental rights.

DISCUSSION

Mother contends the juvenile court erred by failing to apply the parental beneficial relationship exception to termination of parental rights. We find no error.

Case law has been divided as to the correct standard for appellate review of an order determining the applicability of the parental beneficial relationship exception. Most published decisions have reviewed such orders for substantial evidence. (See, e.g., *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1333; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Others have applied an abuse of discretion standard. (See, e.g., *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*).)

The Sixth Appellate District has cogently expressed the view that the review of a beneficial relationship exception incorporates both the substantial evidence and the abuse of discretion standards of review. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 (*Bailey J.*).) The *Bailey J.* court observed the juvenile court's decision whether an exception applies involves two component determinations. "Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination." (*Id.* at p. 1314.) The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes "'a *compelling reason* for determining that termination would be detrimental [to the child].'" [Citation.]" (*Id.* at p. 1315.) This "'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption[.]" [citation]" is appropriately reviewed under the deferential abuse of discretion standard.

(*Ibid*; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622 [finding *Bailey J.* approach persuasive].) We are likewise persuaded to apply the *Bailey J.* approach.

At a permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*Autumn H., supra*, 27 Cal.App.4th at p. 573.) An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proof on both these prongs: (1) that visitation was consistent and regular; and (2) that the child would benefit from continuing the relationship. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.)

In *Autumn H., supra*, 27 Cal.App.4th at page 575, the court articulated the test for determining whether a child would benefit from continuing a relationship with the natural parent. To succeed under this test, the parent must establish “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Id.* at p. 575.) In evaluating this issue, the court must “balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*) “The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond[, including t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s

particular needs” (*Id.* at pp. 575-576; see also *In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

Here, the record establishes that although Mother’s visits were regular and consistent during some periods of time, at other times Mother’s visits were inconsistent and she failed to visit for extended periods of time. In addition to her many scheduling conflicts that interfered with visits, Mother testified she refused to be around her son while she was under the influence. She did this because she believed declining to visit while under the influence was putting D.D.’s best interests first. Admittedly, it was wise for Mother not to visit D.D. when she was under the influence, but the better choice would have been to abstain from drug use so that she could maximize her opportunities to visit with D.D. SSA agrees D.D. is familiar with Mother, but asserts he does not have a positive emotional attachment to her due to his separation from her at such a young age, and because of Mother’s history of sporadic visitations. Considering the extent and manner of Mother’s visitation, we agree and conclude Mother did not satisfy the first prong of the benefit exception test.

Even if we were to conclude Mother satisfied the first prong, we would additionally need to find Mother satisfied the second prong of the test. To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(B)(i), exception must prove that severing the relationship will cause not merely some harm but substantial harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) “[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.)

Mother asserts she was D.D.’s primary caretaker during the first seven months of his life. This may be true, but the care she gave D.D. was of questionable value. The home Mother provided D.D. during the early months of his life was filled

with the chaos and distress of domestic violence and drug addiction. And the circumstances of Mother's arrest in September 2014, where D.D. was found lying unrestrained in the back seat of a car, do not speak well of the care Mother provided D.D. when he was in her custody.

There is no reason in the record to doubt D.D. enjoyed his visits with Mother and he had a relationship with his maternal grandmother and grandfather. However, this evidence is insufficient to establish the loss of these relationships would cause substantial harm to D.D. "[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) "[F]requent and loving contact" may also be insufficient to establish the type of beneficial relationship "contemplated by the statute." (*Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.) "'Interaction between [a] natural parent and child will always confer some incidental benefit to the child[.]'" but the basis of a beneficial relationship is that the parents have "occupied a parental role." (*Id.* at p. 1419.) "'While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.'" (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

At the six-month review hearing, Mother was reported to be engaging and affectionate with D.D. during their sporadic weekly visits, but at the 12-month review hearing, the social worker determined, "[t]here is not a significant relationship between the child and the mother." By the time of the 18-month review hearing, the social worker opined neither parent had demonstrated an ongoing, long-term pattern of being a parent who would no longer subject D.D. to the issues that brought him into dependency. It cannot be overlooked D.D.'s needs were being met at a high level in his current home environment. D.D. was thriving and this placement was the only home D.D. knew.

Other than Mother's testimony, nothing in the record suggests the benefit D.D. might gain by continuing his relationship with Mother would outweigh the well being he would gain from having a permanent home. While the record establishes Mother had a bond with D.D., there was little evidence D.D. had a similar bond with Mother. D.D. had been in the caring home of his paternal grandparents most of his life. Although Mother had made numerous efforts to resolve her substance abuse problems during the dependency proceedings, her short-term successes have been followed by relapse. The court reasonably concluded D.D.'s outward affection for Mother proved loving contact, but was not the compelling evidence necessary to establish the beneficial relationship exception. We conclude the court did not abuse its discretion by ruling the exception to terminating parental rights did not apply.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.